

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PORTIA MCLEMORE

Claimant

VS.

WAL-MART

Respondent

AND

AMERICAN HOME ASSURANCE COMPANY

Insurance Carrier

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Docket No. 1,007,213

ORDER

Respondent appeals the January 15, 2003 preliminary hearing Order of Administrative Law Judge Brad E. Avery. Respondent contends that claimant's back pain stems from a personal condition rather than any injury arising out of and in the course of her employment. Claimant, on the other hand, requests that the Order of the Administrative Law Judge granting temporary total disability compensation and medical treatment for the July 14, 2002 accident be affirmed.

ISSUES

Did the Administrative Law Judge err in ruling that claimant's injury arose out of and in the course of her employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant alleged accidental injury on July 14, 2002, as she worked as a cashier at the Wal-Mart store. On that day, claimant testified she injured her back when moving

a 24-can case of pop across the scanner. Claimant advised her supervisor that she was having difficulty breathing and was having back pains, and was told to go to the emergency room. Wal-Mart filled out a Wal-Mart Associate Incident Log dated July 14, 2002, showing claimant's name and the fact that she was suffering from shortness of breath and lower back pain. The question on the form which stated the "area of store where incident occurred" indicated "front end-cash register." Claimant went to the emergency room at Stormont-Vail Regional Health Center, where she was provided treatment after being diagnosed with bronchitis and acute lower back strain. Claimant did not, at that time, give the emergency room personnel a history of lifting a case of pop. The history from the emergency room indicates claimant had been having back difficulties for two to three days.

Claimant was asked during the preliminary hearing if she provided a description of her accident to the emergency room personnel, and claimant testified that she did not. The first indication that this matter occurred as the result of claimant moving a case of pop occurred in a telephone note dated August 27, 2002, from Stormont-Vail Health Care. The note indicated that respondent was not wanting to cover her bills, arguing that claimant's back problems were, instead, caused by coughing associated with claimant's bronchitis.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹ Here, the evidence does conflict regarding what claimant may or may not have told the emergency room personnel on the date of the accident. However, the incident log prepared by Wal-Mart does indicate claimant was having low back pain and that it occurred at the cash register in the front end of the store, which is where claimant worked. The Board finds that claimant has proven by a preponderance of the credible evidence that her back pain occurred as the result of activities associated with her employment at the cash register at the Wal-Mart store. The Board, therefore, finds that the Order of Administrative Law Judge granting claimant benefits in the form of temporary total disability compensation and medical treatment should be affirmed.

As is always the case, preliminary hearing orders are temporary and are subject to a full hearing in the matter.²

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated January 15, 2003, should be, and is hereby, affirmed.

¹ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

² K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

c: Timothy J. Pringle, Attorney for Claimant
James B. Biggs, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation